9-18-2017

State v. Bright Respondent's Brief Dckt. 44963

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Appellant, v. JAY RAY BRIGHT, Defendant/Respondent.	)	RESPONDENT'S BRIEF SUPREME COURT NO. 44963 CR-15-00021535

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from an Order on Appeal. Mr. Bright had argued on appeal in the District Court that the Magistrate Court had erred by making additions to the Reasonable Doubt Instruction that lowered the state's burden of proof during Mr. Bright's trial for Driving Under the Influence Second Offense and Possession of Paraphernalia. The District Court granted the his appeal. The state timely appealed from the Order on Appeal.

B. Course of Proceedings & Statement of Facts

On December 30, 2015, Coeur d'Alene Police Officer Fritz arrested Mr. Bright for Driving Under the Influence Second Offense, Possession of a Controlled Substance, to wit: Hydrocodone, and Possession of Paraphernalia. A preliminary hearing took place on February 4, 2016, before the Honorable Judge Van Valin. At that hearing, evidence was adduced that Officer Fritz had taken items out of Mr. Bright's vehicle and listed them as "found" property. Preliminary Hearing Tr. p. 19 L. 19-23. The matter was bound over. In the District Court, the state moved to dismiss the Possession of a Controlled Substance charge. The matter was remanded to the Magistrate Court.

On June 23, 2016, the Magistrate Court held a trial on the remaining charges of Driving Under the Influence Second Offense and Possession of Paraphernalia. Mr. Bright moved in Limine to prevent the state from introducing evidence of the laboratory result in the case on the grounds that the results simply showed the substances had been introduced into his body at some point but could not alone show that he was under the influence, and therefore the results would be improper evidence of other bad conduct not tied to the case. Tr. p. 15, L. 6-11, L. 15-22. The state did not object to the

exclusion of evidence of carboxy-THC but did object to amphetamine and methamphetamine being excluded. Tr. p. 15, L. 13, L. 24-25, p. 16, L. 1-16. The Court excluded only the carboxy-THC, finding that the amphetamine and methamphetamine were not a legal issue and that the question was what the jury believed. Tr. p. 16, L. 17-25.

During voir dire, the prosecutor asked the jury what kind of evidence they would need to convict, eventually indicating that the Court may tell them that failed field sobriety tests alone was sufficient evidence for a conviction:

> MS. IRIMESCU: Part of the process of doing the field sobriety tests, the officer initially asks questions about the physical ability of the driver to complete those tests, so that is taken into consideration.
>
> But if the Judge tells you that field sobriety tests are enough to prove that a person is under the influence, nothing else is needed in addition to that necessary [sic], would you have a problem?

Tr. p. 56, L. 20-25, p. 57, L. 1-3. Mr. Bright objected, and the Court overruled:

> MR. NAFTZ: I'm going to object to that question, your Honor. It misstates the law.
>
> THE COURT: Well, I don't – I'm going to overrule. I don't think it's a – I think it's to find out what their opinion is. They can answer "no" or "yes," whatever.

Tr p. 57, L. 4-9. The prosecutor then reasked the question:

> UNIDENTIFIED JUROR: What is it? Say it again.
>
> MS. IRIMESCU: If the Judge tells you that there is no other test that an officer needs to do in addition to the field sobriety tests for somebody driving under the influence, would you have trouble with just using the field sobriety test to make your decision whether the person is

under the influence or not? You can still make your decision based on that one field sobriety test.

Tr. p. 57, L. 12-21. The transcript is unclear but at least two jurors indicated that they did not think that would be enough evidence and one of them or a separate juror began asking a question when the prosecutor then stated:

Ms. IRIMESCU: But the driver has a right to refuse to blow into the breathalyzer and has a right to refuse to give blood. That is their right. So – and that's why if the Judge instructs you that there is no blood or breathalyzer—

Tr. p. 58, L. 2-6. Again Mr. Bright objected, and this time the Court upheld the objection without comment. Tr. p. 58, L. 7-10. The prosecutor then began asking what additional facts the jury would need. Eventually the prosecutor asked:

MS. IRIMESCU: So this harder for a person [sic] that doesn't have training to see and analyze those factors, but if an office does a field sobriety test and considers that person under the influence based on the field sobriety test, would you have a problem making a decision –

Tr. p. 59, L. 3-8. Again Mr. Bright objected to this bolstering, only to be overruled without comment. Tr. p. 59, L. 9-13.

After Mr. Bright's Voir Dire, the Court gave its opening instructions. While instructing the jury on reasonable doubt, after reading about half way through the instruction, the Court said:

THE COURT: And, as I said yesterday, you didn't check your common sense at the door. Okay. You've all broke up fights and arguments, you know how to do this.

Tr. p. 73, L. 10-16.

The prosecutor then gave her opening statement. The prosecutor gave the jury an outline of the facts of the case. Tr. p. 81-86. However, after she finished with her rendition, she then said:

> MS. IRIMESCU: Now, on the night of December 30th, 2015, Mr. Bright, the defendant, was in physical possession of his car as he was in the driver's seat with the car running. He was intoxicated. He was intoxicated to the point that he could not finish a sentence. He was intoxicated to the point that even when he was surrounded by police officers flashing their lights in his face, he was falling asleep. He was dozing off.
>
> Mr. Bright, was intoxicated that night. He was under the influence of drugs.

Tr. p. 86, L. 3-13. At this point Mr. Bright objected to this as argument. The Court overruled stating that this was "opening statement." Tr. p. 86, L. 14-17. Ms. Irimescu continued:

> MS. IRIMESCU: You'll see that there are several factors that you can – you will be able to look at to determine that. First, he was at the gas station passed out in front of a gas pump and he has been there for over two hours passed out.
>
> Second, you will be able to see his demeanor. You will be able to see his reaction and you will be able to see his lack of focus and lack of ability to follow instructions. You will also see how he did on his field sobriety tests. You will be able to see how – how he did on each one of those tests.
>
> And you will also see that there was paraphernalia found in his car. There were syringes found in his car. And you will be able to hear from the lab, the person who did the lab report, that in his system there was both amphetamines and methamphetamines.
>
> There was paraphernalia in the car – there was drug paraphernalia in the car and Mr. Bright was driving while he was intoxicated. So for all the evidence, I'm going to ask you to find

him Guilty of Count I of driving under the influence of drugs and guilty in Count II of guilty of possession of Paraphernalia.

Thank you.

Tr. p. 86, L. 18-25, p. 87, L. 1-16.

After Mr. Bright's opening the state called its first witness, Officer Phillips of the Coeur d'Alene Police Department. Officer Phillips testified to encountering Mr. Bright asleep in his vehicle at a gas pump at a Tesoro gas station at 4:30 a.m. on December 30, 2016. Tr. p. 93, 94. The Court admitted the vievue and dashcam video from Officer Phillips into evidence as exhibits 1 and 3. Tr. p. 95, L. 16-17, p. 97, L. 13-19. Officer Phillips testified that Mr. Bright was quiet and cooperative after he had been awoken, and that he appeared lethargic and under the influence of drugs due to his sluggish behavior and poor balance. Tr. p. 100. He also testified that he found "drug paraphernalia" in Mr. Bright's vehicle, syringe caps and a meth pipe. Tr. p. 100. On cross examination, the officer admitted he did not know if the vehicle was ever on during the incident. Tr. p. 110, L. 11-23.

The state then called Coeur d'Alene Police Officer Nick Cannon. Officer Cannon indicated he was acting as a field training officer on December 30, 2015, when he and Officer Fritz encountered Mr. Bright. Tr. p. 113-115, 119. Officer Cannon testified that he saw Office Fritz try several time to awaken Mr. Bright. Tr. p. 119, L. 15-20. Officer Cannon testified that Mr. Bright's face was relaxed, his eyes glassy, and that he was lethargic. Tr. p. 120, L. 4-5. He could not recall if the vehicle was running. Tr. p. 120, L. 6-8. Officer Cannon then repeated this testimony, stating that Mr. Bright had "a lot of signs of impairment" and adding that he though it "appeared as though [Mr. Bright] had impaired memory. Lack of focus." Tr. p. 121, L. 4-13. Officer Cannon testified that this

behavior was consistent with being under the influence of methamphetamine. Tr. p. 121, L. 18. He followed this by testifying that methamphetamine was a stimulant, "so it will cause people to [he guessed] have energy at first and then crash after that." Tr. p. 121, L. 20-23. Officer Cannon then testified as to Mr. Bright's performance of field sobriety tests. Tr. p. 122-128. Officer Cannon testified that Mr. Bright failed the walk and turn and the one legged stand and was arrested for driving under the influence. Tr. p. 127-129. At this point, the state asked Officer Cannon to repeat whether the behavior was consistent with using or coming down off methamphetamine. Tr. p. 129, L. 12-18. Officer Cannon testified that it was "possible" that Mr. Bright was impaired from methamphetamine. Tr. p. 129, L. 21-25. Officer Cannon went on to testify that Mr. Bright passed a breath test and that Officer Knoll was brought in as a drug recognition expert. Tr. p. 130-131.

Officer Cannon also testified that he located a digital scale, pipes with residue he recognized as meth pipes, and some syringes. Tr. p. 131. The Court admitted pictures of the items as exhibit 4. Tr. p. 131-132. The officer testified that he had only seen such pipes used to smoke meth. Tr. p. 133. At this point, the state introduced and the Court admitted Officer Fritz's vievue video as exhibit 2. Tr. p. 136.

On cross-examination, Officer Cannon stated that Mr. Bright denied being under the influence of drugs or alcohol. Tr. p. 142, L. 16-18. Mr. Bright then attempted to ask Officer Cannon about the property that was listed as "found" property. Tr. p. 144, L. 7-10. The Court sua sponte interrupted him, and ordered him not to ask about the items taken by the officers. Tr. p. 144, L. 11-17. Officer Cannon then admitted that the "drug paraphernalia" taken from the car had never been tested. Tr. p. 144, L. 18-25, p. 145, L. 1-6. Officer Cannon went on to admit that Officer Fritz was

not hired by the Coeur d'Alene Police Department due to issues that were not "specific to this incident." Tr. p. 145, L. 7-10.

On redirect, Officer Cannon testified that Mr. Bright had said he had driven to the gas station. Tr. p. 145, L. 16-22.

The state then called Coeur d'Alene Police Officer Nick Knoll. Officer Knoll testified that he is a drug recognition expert called in to examine whether a person is impaired where drugs are suspected. Tr. p. 151-152. He testified that he met with Mr. Bright who refused to do an evaluation but agreed to provide a urine sample. Tr. p. 153. He gave that sample to an evidence tech. Tr. p. 155.

The state then called Brittany Wylie of the Idaho State Police Forensic Services Lab in Coeur d'Alene. Tr. p. 168. Ms. Wylie testified to following procedure when testing the sample from Mr. Bright's case and that it contained methamphetamine and amphetamine. Tr. p. 173-176.

At the close of the state's case, Mr. Bright moved for an acquittal. The Court ruled:

> THE COURT: The question is whether or not he was in actual physical control. And I would find that he was in actual physical control and the basis for that, Mr. Naftz, is two reasons. One is that on Exhibit 2 Officer Fritz was talking to Mr. Bright and said, "Please turn off the vehicle and put the keys up on the dashboard." I think he said that a couple of different times in that. That's an admitted actual physical control. He was in the driver's seat and the – that's not an assertion that is – that is a request for him to do something. So I don't find that it violates the hearsay rule.
>
> As far as whether it was running or not, I don't, you know, I don't know. But that's a determination that has to be made by the jury. They can either believe that or not. But I would – I did find that that's – I did hear that on there and I believe that he asked him tot do

it a couple of times. So I think that's a sufficient amount for the fact finder, who is the jury, to make a determination as to whether or not they believe that it was running.

If you couple that along with the fact that Mr. Bright stated that he had driven there, I think that there is sufficient evidence to get over a Rule 29 motion to dismiss as far as that case is concerned. Regarding the – or that count is concerned.

Tr. p. 182 L. 19-25, p. 183, L. 1-19. Mr. Bright pointed out that in the video he told the officer the vehicle was off, and that one can clearly see that no keys are in the ignition. Tr. p. 184, L. 13-19. The Court responded:

THE COURT: I could not see the television.

Tr. p. 184, L. 20. The Court then posited that the car did not need to be on if the keys were in the ignition, which the prosecutor stated was not, at law, the case. Tr. p. 185, L. 4-12. The Court decided it would be a question for the jury. Tr. p. 185, L. 13-15.

The Court also denied the Motion to Acquit Mr. Bright of the Paraphernalia charge. The Court then considered the requested jury instructions.

During closing, the state argued that Mr. Bright put lives in danger. Tr. p. 218, L. 2-7. After deliberating, the jury found Mr. Bright guilty on both counts.

Mr. Bright timely filed a notice of appeal to the District Court alleging five separate errors and cumulative error.

On appeal, the District Court found that the Magistrate Court's comment on the state's burden at trial suggested that the standard of proof is only one of common sense and based on the standard by which each juror settles conflict in their own lives. The Court found this did not meet

constitutional requirements and thus was structural error. Addressing only these grounds, the Court vacated Mr. Bright's convictions, and remanded the matter.

The state timely appealed from the District Court's Order on Appeal.

ISSUES ON APPEAL

I. Whether the Magistrate Court committed structural error when it equated reasonable doubt with breaking up an argument in everyday life in its instructions.

II. Whether the state has now raised on appeal to this Court the issue of the standard of review for unpreserved structural error.

III. Whether a reasonable doubt instruction that violates a defendant's right to Due Process can be harmless.

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ARGUMENT

I.

A. Introduction

The District Court correctly found that the Magistrate Court erred in changing the reasonable doubt instruction to equate the state's burden with resolving a common squabble. Because this was structural error, reversal was the appropriate remedy.

B. Standard of Review

The question whether the jury has been properly instructed is a question of law over which an appellate court exercises free review. *State v. Gleason*, 123 Idaho 62, 65 (1992). When reviewing jury instructions, an appellate court asks whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman*, 124 Idaho 936, 942 (Ct.App.1993). Where an instruction defining reasonable doubt is challenged as violative of due process, the question "is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Victor v. Nebraska*, 511 U.S. 1, 6 (1994).

C. The Magistrate improperly told the jury that reasonable doubt was comparable to the way they settle arguments in their everyday lives.

It is fundamental that the constitutional guarantee of due process requires that the government prove beyond a reasonable doubt every element of a charged offense. *In re Winship*, 397 U.S. 358 (1970). The Idaho Court of Appeals extensively analyzed authorities on permissible reasonable doubt instructions in *State v. Laramore*, 145 Idaho 428 (Ct.App.2007). The Court parsed the holdings of the United States Supreme Court in *Cage v. Louisiana*, 498 U.S. 39 (1990), *Victor v. Nebraska*, 511 U.S. 1 (1994), and *Holland v. United States*, 348 U.S. 121 (1954). *Id.* at 434-35. Much of the

discussion in the matter was over the mischief that the words "would make a reasonable person unwilling to base an important decision on that evidence," and the fact that such language appeared to run afoul of these precedents. *Laramore,* 145 Idaho at 434. The Supreme Court in *Holland*, for example, expressed concern with instructions saying reasonable doubt would be that which would make a person unwilling to act, rather than hesitate to act. *Id*. at 435, citing *Holland*, 348 U.S. at 140. The issue in these cases was just how substantial reasonable doubt has to be.

As the District Court found, the Magistrate Court's instruction was the current ICJI 103 on reasonable doubt followed by the court's additional instructions. Order on Appeal, p. 2. The model instruction no longer contains the language the court in *Laramore* relied on to find that the instruction was Constitutional: "[if] you do not have an abiding faith amounting to a moral certainty to the truth of the charge, you should find the defendant not guilty." *Id*. at 436. The current instruction provides:

> Second, the state must prove the alleged crime beyond a reasonable doubt. A reasonable doubt is not a mere possible or imaginary doubt. It is a doubt based on reason and common sense. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. If after considering all the evidence you have a reasonable doubt about the defendant's guilt, you must find the defendant not guilty.

The current instruction contains no description of what reasonable doubt *is*; it only describes what it is *not* and how it might arise. Thus, when the Magistrate Court asserted that deciding whether a reasonable doubt exists in a case is simply common sense, the same as settling a quarrel in their everyday lives, the court gave content to a concept that had been left largely without contour by the ICJI.

Thus, the question is whether reasonable doubt is the same as what one would rely on in

picking a side in an everyday quarrel.

> [In *Victor* the] Supreme Court found that the portion of this instruction equating reasonable doubt with "substantial doubt" was problematic. The Court nevertheless held that this second instruction was not constitutionally infirm, in part because it also:
>
> provided an alternative definition of reasonable doubt: a doubt that would cause a reasonable person to hesitate to act. This is a formulation we have repeatedly approved, *Holland v. United States*, 348 U.S. at 140, 75 S.Ct. at 137; *cf. Hopt v. Utah*, 120 U.S. [430] at 439–441, 7 S.Ct. [614] at 618–620,[30 L.Ed. 708 (1887)] and to the extent the word "substantial" denotes the quantum of doubt necessary for acquittal, the hesitate to act standard gives a common-sense benchmark for just how substantial such a doubt must be.

Laramore, 145 Idaho at 435, *quoting Victor*, 511 U.S. at 20–21.

> In *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), an instruction defined reasonable doubt as "the kind of doubt ... which you folks in the more serious and important affairs of your own lives might be willing to act upon." The Supreme Court held:
>
> *We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, see Bishop v. United States*, 71 App. D.C. 132, 107 F.2d 297, 303 [(1939)], rather than the kind on which he would be willing to act. But we believe that the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some. A definition of a doubt as something the jury would act upon would seem to create confusion rather than misapprehension. "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," *Miles v. United States*, 103 U.S. 304, 312, 26 L.Ed. 481 [(1880)], and we feel that, taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury. [emphasis in original]

Id. Thus, a reasonable doubt is essentially one that would cause a reasonable and prudent person to hesitate to act when considering an important life decision. The Magistrate Court's instruction was error in two ways: it told the jury to consider an everyday situation, and it gave as its example choosing a side in a quarrel rather that making a decision with real consequences. The Magistrate Court's instruction denigrated not only the reasonable doubt standard and the burden placed on the

state, but the criminal jury trial system, equating it to a neighborhood squabble.

No instructions provided during the trial, or other statements by the trial court did anything to alleviate the damage done to the structure of this trial. Therefore, the District Court correctly vacated the convictions in this matter.

1. *The state asks this Court to apply the wrong test to the Magistrate Court's error.*

The state argues that the Magistrate Court's instructions were comments that were to be evaluated pursuant to a test created by the 10th Circuit Court of Appeals. State's Brief at 8, *citing United States v. Olgin*, 745 F.2d 263, 268-69 (10th Cir. 1984). The test relates to an argument for giving an improper instruction on an element of giving false information. *Id.* at 266. The state provides no authority as to why this would be controlling in Idaho, and cites to no Idaho precedent for its argument. Idaho courts have their own test for improper instructions. *See, e.g.*, *State v. Southwick,* 158 Idaho 173, 181 (Ct.App.2014). But as argued above, the test for issues with the reasonable doubt instruction is that in the *Laramore* opinion. The state failed to provide argument or authority as to why this Court should consider the District Court's ruling under a test from a foreign jurisdiction that was not developed for the issue presented here. The state's argument is waived. *State v. Zichko*, 129 Idaho 259, 263 (1996).

2. *The state fails to provide a cogent argument as to why the Magistrate Court's instructions were not reasonably likely to affect the jury.*

The state then argues that the comment was not "material" from the *Olgin* test, but then properly recites the reasonable likelihood test from *Victor v. Nebraska*, 511 U.S. 1, 6 (1991). The state then argues that the Magistrate Court's comments were not made part of the written instructions and were simply offhand comments. The state provides no argument or authority as to why this is

relevant. The state then provides the conclusory argument that even if the Magistrate Court's comments were applied by the jury, Mr. Bright failed to show they were applied in an unconstitutional manner. Later, the state also argues that the Magistrate had merely told the jury to use common sense and that it could determine who to credit in a conflict. It argues that the Magistrate's instructions "were to the same effect as the United State Supreme Court's explanation of moral evidence and moral certainty." State's Brief at 9, *citing Victor,* 511 U.S. at 10-13. The state provides no further elucidation as to how it arrived at this conclusion.

The state's analysis does not follow the Supreme Court, or even cite to the correct portion of the decision. In *Victor*, the Court found:

> In the *Cage* instruction, the jurors were simply told that they had to be morally certain of the defendant's guilt; there was nothing else in the instruction to lend meaning to the phrase. Not so here. The jury in Sandoval's case was told that a reasonable doubt is "that state of the case which, *after the entire comparison and consideration of all the evidence,* leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." Sandoval App. 49 (emphasis added). The instruction thus explicitly told the jurors that their conclusion had to be based on the evidence in the case. Other instructions reinforced this message. The jury was told "to determine the facts of the case from the evidence received in the trial and not from any other source." *Id.,* at 38. The judge continued that "you must not be influenced by pity for a defendant or by prejudice against him.... You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id*., at 39. Accordingly, there is no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the case.
>
> We do not think it reasonably likely that the jury understood the words "moral certainty" either as suggesting a standard of proof lower than due process requires or as allowing conviction on factors other than the government's proof. At the same time, however, we do not condone the use of the phrase. As modern dictionary definitions of moral certainty attest, the common meaning of the phrase has changed since it was used in the *Webster* instruction, and it may continue to do so to the point that it conflicts with the *Winship* standard. Indeed, the definitions of reasonable doubt most widely used in the federal courts do not contain any reference to moral certainty. See Federal Judicial Center, Pattern Criminal Jury Instructions 28 (1988); 1

> E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 11.14 (3d ed. 1977). But we have no supervisory power over the state courts, and in the context of the instructions as a whole we cannot say that the use of the phrase rendered the instruction given in Sandoval's case unconstitutional.

Victor, 511 U.S. at 16, 17 *citing Cage v. Louisiana*, 498 U.S. 39 (1990) *disapproved of by Estelle v. McGuire* (1991); *Commonwealth v. Webster*, 59 Mass. 295 (1850). Thus, the reasonable likelihood test analyzes the instruction given to the jury in its totality and asks if the jury would be led to believe that the burden on the state was less than it actually was. It does not look at whether the Court's instructions appear in print and nor did it create an "offhand comment" exception. When a trial court tells a jury something intended to help them arrive at a determination, juries are presumed to have followed the court's instructions. *Phillips v. Erhart*, 151 Idaho 100, 109 (2011). Lastly, is difficult to see how the Supreme Court's decision as to "moral certainty" is equivalent to the Magistrate Court's "breaking up fights and arguments" instruction. People simply do not put into their everyday arguments the same consideration that a jury is expected to give a criminal defendant in this country.

As argued above and before the District Court, it is clear that the Magistrate Court's provision of a definition for reasonable doubt that differed from the burden as it has been defined by the Supreme Court was reasonably likely to affect the jury because the model jury instruction provides no definition for the phrase. The Magistrate Court filled a vacuum with an inaccurate statement of the gravity of the decision the jurors would have to make. There was nothing in the record that might have swayed them to think otherwise as the instructions at no point touch on what reasonable doubt means. The District Court correctly found that the comment was reasonably likely to affect the jurors' decision.

3. *The state failed to recognize that structural error is always fundamental error.*

The state goes on to argue that the error could have been cured had Mr. Bright objected. State' Brief at 8. Additionally, the state argues in its brief that the error was not fundamental error. State's Brief at 6. The state recognizes correctly that an error as to the reasonable doubt instruction would be structural error and claims that no such error occurred in this case. State's Brief at 6-7.

The state's argument appears to be then that because the error was not structural, it had to be preserved. The state is simply missing the issue here. Either an error occurred in the giving the reasonable doubt instruction in which case that error "unquestionably qualifies as 'structural error' " and is not subject to harmless error analysis and necessitates a new trial, or no error occurred. *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993); *see also State v. Sheahan*, 139 Idaho 267, 273 (2003). There is no lesser form of error when it comes to the burden of proof. *See id*. It is unclear from *Sheahan* whether the instruction received an objection in the trial court. The Idaho Supreme Court held that the defendant may not make new arguments that were not made to the Court of Appeals. *Id*. at 275. One would think that those issues also had not been preserved in the trial court, and that it does not appear that the Supreme Court considered that an issue in cases involving structural error.

The question of what standard of review should *unpreserved* structural error receive was not raised by the state in this case either in the District Court on appeal or in its appeal to this Court. Thus, this Court should consider it waived. *Pizzuto v. State*, 146 Idaho 720, 730-31 (2008). However, should this Court decide that the state's appeal is an appropriate vehicle to consider the issue of how to deal with unpreserved structural error, this Court should consider the findings of other jurisdictions summarized by the Maryland Court of Appeals in *Savoy v. State*, 22 A.3d 845,

852 n. 4 (2011):

> The overwhelming majority of courts that have considered this issue have held, as we do here, that un-preserved structural errors are not automatically reversible, but, instead, are subject to plain error review. *See United States v. Birbal*, 62 F.3d 456, 461 (2d Cir.1995) (applying plain error review to un-objected-to constitutionally deficient reasonable doubt instruction); *United States v. Washington,* 12 F.3d 1128, 1138 (D.C.Cir.1994) (explaining that an un-objected-to constitutionally deficient reasonable doubt instruction is structural error under *Sullivan* and applying plain error review); *United States v. Colon–Pagan*, 1 F.3d 80, 81 (1st Cir.1993) (Breyer, J.) ("Because appellant's counsel did not object to [a constitutionally deficient reasonable doubt instruction] at trial, the issue on appeal is whether [the instructions] contain an error that is 'plain' or a 'defect' [ ] that affect[s] substantial rights"). *See also United States v. David,* 83 F.3d 638, 647–48 (4th Cir.1996) (applying plain error review to structural error); *United States v. Lopez,* 71 F.3d 954, 960 (1st Cir.1995) ("In all events, our best guess is that the Supreme Court would regard an omitted element reversible error *per se* if there were a timely objection—although not automatically 'plain error' if no objection occurred....").
>
> Petitioner relies for the contrary view on two out-of-state cases, *People v. Duncan*, 462 Mich. 47, 610 N.W.2d 551 (2000), and *State v. Colon,* 118 Ohio St.3d 26, 885 N.E.2d 917 (2008). We do not find those cases persuasive.
>
> The analysis in *Duncan,* in our view, is flawed. True, the Michigan Supreme Court held in *Duncan* that structural errors are automatically reversible, regardless of the failure to make a contemporaneous objection. 610 N.W.2d at 552 (reversing defendant's conviction despite failure to object at trial to instruction's omission of all of the elements of a crime because the omission was structural error). In so holding, the Michigan Supreme Court misconstrued, and thereby misapplied, Supreme Court precedent, particularly *Sullivan, Neder v. United States,* 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), and *Johnson v. United States,* 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), to support that court's conclusion that structural errors are not subject to preservation requirements. As explained above, *Sullivan* says nothing about automatic appellate review of un-preserved structural errors. Neither does *Neder*, in which the Supreme Court held that the omission of an element of a crime in a jury instruction is subject to harmless-error analysis. 527 U.S. at 10, 119 S.Ct. 1827 (in fact, an objection was made to the omission at trial). And in *Johnson*, the Supreme Court expressly avoided deciding whether the instructional error was structural and thus automatically reversible, explaining that, even if it was, the error did not "seriously affect[ ] the fairness, integrity or public reputation of [the] judicial proceeding[ ]" and would not warrant exercise of plain error review. 520 U.S. at 469, 117 S.Ct. 1544 ("But we need not decide that question because, even assuming that the failure to submit materiality to the jury [was a structural error], it does not meet

the final requirement of [plain error].").

> Nor are we persuaded by *Colon,* 885 N.E.2d at 926, which was expressly overruled by the Ohio Supreme Court in *State v. Horner,* 126 Ohio St.3d 466, 935 N.E.2d 26, 34 (2010) (expressly overruling *Colon* and stating "[w]e hold that failure to timely object to a defect in an indictment constitutes a waiver" and "is limited to a plain-error review on appeal").

In plain error review the burden is upon the defendant to demonstrate that the error did affect the outcome. *State v. Perry*, 150 Idaho 209, 226 (2010). Under Idaho jurisprudence, that would mean that such an error is fundamental. *Id*. The error in this case ***was*** fundamental. As argued above, the Magistrate Court injected a meaning for the beyond a reasonable doubt standard that is less than what that standard has been held to mean. Courts in Idaho cannot instruct juries to treat criminal cases like an argument from their daily lives.

In *Sheahan*, 139 at 273, the Idaho Supreme Court found that "If a reasonable doubt instruction is found to have lessened the state's burden of proof, the error is never harmless error." *citing Sullivan*, 508 U.S. 281. Thus, reversal would still be appropriate.

4. The state is the appellant and did not attempt to add anything to the record before this Court, nor did it seek to do so when it was responding below.

Lastly, the state attacks the Respondent for failing to provide an appropriate record on appeal. State's Brief at 9. The state references statements that the Magistrate Court made about instructions it had given the jury a day before. Whatever point the state is seeking to make here is not supported by any cogent argument or authority. Thus, its claim is waived. *Zichko*, 129 Idaho at 263. Additionally, this claim was never raised before the Court below, and thus cannot be raised now. *Pizzuto*, 146 Idaho at 730-31.

CONCLUSION

The case before this Court is relatively simple. The state needed to prove that Mr. Bright was under the influence, but its evidence was contradictory and lacking. Unfortunately for Mr. Bright, the jury was exposed to misinformation from the beginning of the case as to the burden the state had to prove its case. Mr. Bright did not have a fair trial. This Court should affirm the ruling of the District Court and dismiss this appeal.

DATED this _____ day of September, 2017.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY: __/S/ JAY LOGSDON__
JAY LOGSDON, ISB 8759
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I have this __18___ day of September, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF via email on the other party:

___X___ Lawrence G. Wasden
Attorney General
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ecf@ag.idaho.gov

_____/S/ Jay Logsdon_____